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‘NOT STARTING IN SIXTH GEAR’:
AN ASSESSMENT OF THE U.N. GLOBAL COMPACT’S USE OF SOFT
LAW AS A GLOBAL GOVERNANCE STRUCTURE FOR CORPORATE
SOCIAL RESPONSIBILITY

By Roya Ghafele and Angus Mercer***

ABSTRACT

The practical difficulties with employing hard law at an international level have resulted in softer codes of conduct stepping in to fill the void. The United Nations Global Compact is amongst the most ambitious of these codes, created with a desire to engage businesses in corporate social responsibility (CSR) initiatives. Soft law regulatory instruments, such as voluntary standards and framework agreements, have been routinely criticized for the vagueness and subjectivity of the commitments they elicit from their participants. However, what appears to be lacking in the existing literature is a critical analysis of such commitments. Through examining the use of soft law by the Compact, we argue that although many question or even dismiss its non-binding approach, it provides an illustrative example of the benefits of soft law over harder forms of regulation. The use of soft law as a global governance structure should not be dismissed as a ‘Plan B’ in the event that harder law is not practical. Clear benefits exist in starting an international regulatory mechanism at the softer end of the ‘legalization spectrum’ before toughening up later on.

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INTRODUCTION: THE RISE OF THE MULTINATIONAL CORPORATION

*"Transnational corporations are increasing their influence over the economic, political and cultural life of humanity whilst remaining almost completely unaccountable to global civil society."*¹

The rising influence of multinational corporations is now widely accepted in contemporary international law and public policy scholarship.² As James Rosenau observed twenty years ago, "[t]he very notion of international relations seems obsolete in the face of an apparent trend in which more and more of the interactions that sustain world politics unfold without the direct involvement of nations or states."³ Multinationals have emerged as one of the most powerful actors in a new global civil society; arguably the biggest beneficiary of a post-Cold War reconstitution of the global public domain. Along with international nongovernmental organizations and other increasingly powerful non-state actors, big businesses now vie for power on the international stage, a development which has led many scholars to abandon more traditional state-centric perspectives.⁴ By the turn of the last century, multinationals accounted for 51 of the largest 100 economic entities in the world, and a quarter of global output.⁵ Given this enormous resource capacity, it is hardly surprising that some scholars have started to view multinationals as an emerging type of

¹ Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT'L AFF. 71, 75-76 (2002).

² See, e.g., Sarah Anderson & John Cavanagh, *Top 200: The Rise of Corporate Global Power*, GLOBAL POLICY FORUM (2000) available at: <http://www.globalpolicy.org/soecon/tncs/top200.htm> (last visited Jan. 11, 2011).

³ JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* 6 (Princeton University Press) (1990).

⁴ Stefan Fritsch, *The UN Global Compact and the Global Governance of Corporate Social Responsibility: Complex Multilateralism for a More Human Globalisation?*, 22 GLOBAL SOC'Y 1, 22 (2008).

⁵ Anderson & Cavanagh, *supra* note 2.

“private authority” with the capability of usurping roles traditionally associated with the state.⁶

The importance of regulating companies through global Corporate Social Responsibility (CSR) initiatives is difficult to overstate. Businesses have the capacity to both benefit and cause great harm to their surrounding environment. Renowned global governance theorist Andrew Kuper argues that “[a]n outlook that ignores corporations . . . strikes most informed commentators as fiddling while Rome burns.”⁷ The specific resources and competencies of large-scale companies must be harnessed to ensure cheap and efficient delivery of socially beneficial services.

CSR initiatives have risen to prominence because of a growing discrepancy between the social costs caused by companies and the comparably limited scrutiny they face in dealing with those costs.⁸ The concept of CSR is amorphous, with definitions ranging from mere corporate compliance with legal obligations to those involving active and voluntary engagement in socially beneficial behavior.⁹ Whichever definition one chooses to employ, it is clear that the growing influence of companies at an international level has triggered heightened societal expectations of corporate behavior. There is, in short, a growing sense that businesses need to accept greater responsibility for their actions.¹⁰

In light of these heightened expectations, how can multinational corporations be held to account? How can their unrivalled global capacity be harnessed and utilized in the most effective way possible? In other words, how can we develop global governance structures that are relevant to the new economic realities of our times?

In this article, we state the case for the unique role that soft law mechanisms can play in the regulation of large corporations. Soft law instruments, such as voluntary standards and framework agreements, have been roundly criticized for the vagueness and subjectivity of the commitments they elicit from their participants.¹¹ However, the existing

⁶ Ann Florini, *Business and Global Governance: The Growing Role of Corporate Codes of Conduct*, BROOKINGS REV., Vol. 21, Spring 2003. See also PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney B. Hall & Thomas J. Biersteker eds., 2002).

⁷ Andrew Kuper, *Harnessing Corporate Power: Lessons from the U.N. Global Compact*, 47 SOC’Y FOR INT’L DEV. 9, 10 (2004).

⁸ Florini, *supra* note 6.

⁹ Lisa Whitehouse, *Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?*, 3 GLOBAL SOC. POL’Y 299, 303- 304; DOW VOTAW & S. PRAKASH SETHI, THE CORPORATE DILEMMA: TRADITIONAL VALUES AND CONTEMPORARY PROBLEMS 11 (1973).

¹⁰ Fritsch, *supra* note 4, at 7.

¹¹ John King Gamble Jr., *The 1982 United Nations Convention on the Law of the Sea as*

literature lacks a critical analysis of such commitments. We have attempted to bridge this gap by analyzing the norms generated by the United Nations Global Compact ("Compact"), through a framework capable of both assessing the initiative's merits and weaknesses and tracing its development. We argue that, although many question or dismiss its non-binding approach,¹² the Compact provides an illustrative example of the benefits of soft law over harder forms of regulation.

I. THE LEGALIZATION SPECTRUM: FROM SOFT LAW TO HARD LAW

It is important to define the most basic concepts of soft and hard law at the outset. Hard law has been defined as "norms creating precise legal rights and obligations."¹³ Soft law, by contrast, consists of rules which are not legally binding, but which still intend to produce changes in behavior from those it regulates.¹⁴ No binary choice exists between soft and hard law; it is better to regard these two forms of legalization as ideal types sitting at opposite ends of a "continuum with numerous graduations."¹⁵ We shall be referring to this continuum as the "legalization spectrum."

What factors determine the "softness" or "hardness" of a rule? In their seminal article, Kenneth Abbott and Duncan Snidal suggest that rules can be broken down into three different dimensions: "obligation," "precision," and "delegation."¹⁶ "Obligation" simply refers to the extent to which actors are legally bound by the rule in question. Prototypical soft law does not confer binding legal obligations, unlike its hard law counterpart.¹⁷ "Precision" refers to the detail in which the rule governing the actor in question is set out, both in terms of the objective and the method by which to achieve it.¹⁸ In this respect, soft law is identifiable by the deliberately vague nature of the obligations imposed¹⁹ and the consequent discretion left to the parties being

Soft Law, 8 HOUS. J. INT'L L. 37 (1985).

¹² Jonathan Cohen, *The World's Business: The United Nations and the Globalisation of Corporate Citizenship*, in PERSPECTIVES ON CORPORATE CITIZENSHIP 196 (Jorg Andriof & Malcolm McIntosh eds., Greenleaf Publishing 2001); Maureen A. Kilgour, *The UN Global Compact and Substantive Equality for Women: revealing a 'well hidden' mandate*, 28 THIRD WORLD Q. 751, 773 (2007); Fritsch, *supra* note 4.

¹³ Prosper Weil, *Towards Relative Normativity in International Law?* 77 AM. J. INT'L L. 413, 414 (1983).

¹⁴ Snyder, F. 'Soft Law and Institutional Practise in the European Community', European University Institute Working Paper, Law No. 93/5: 2 (1993).

¹⁵ Gamble, *supra* note 11, at 38.

¹⁶ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 456 (2000).

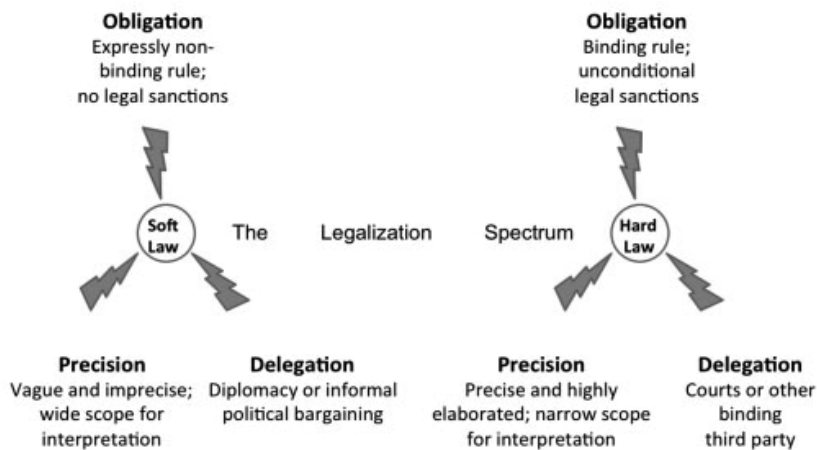
¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Joseph Gold, *Strengthening the Soft Law of Exchange Arrangements*, 77 AM. J. INT'L

regulated.²⁰ By contrast, hard law is precise, clear and unambiguous.²¹ Finally, “delegation” refers firstly to the degree to which third parties have been assigned the responsibilities of interpreting, implementing and applying the rule. It also refers to the degree to which such parties have been assigned the responsibility for resolving disputes relating to the rule.²² The degree of enforcement plays a crucial role in determining the degree of “delegation.”²³

Under this framework, each of the three dimensions of legalization has its own continuous sliding scale. The higher a rule scores across the three dimensions, the “harder” it is, hence the higher it will sit on the overall legalization spectrum.²⁴ Given the myriad different types of rules and regulations employed throughout the international arena²⁵ and the diverse range of institutions which can generate them, it is impossible to identify any such universally applicable threshold with any kind of certainty. Nevertheless, rules and regulations can be placed accurately at a certain point along each of the three sliding scales (obligation, precision and delegation) as well as on the overall legalization spectrum (see diagram below).



Adapted from Abbott et al, 2000

L. 443 (1983).

²⁰ Tadeusz Gruchalla-Wesierski, *A Framework for Understanding Soft Law*, 30 MCGILL L.J. 37 (1984).

²¹ Abbott & Snidal, *supra* note 16, at 421.

²² *Id.* at 421-56.

²³ *Id.*

²⁴ *Id.* at 426-34.

²⁵ C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law* 38 INT'L & COMP. L.Q. 850, 851 (1989).

The arrow emphasizes that any perception of a soft law/ hard law dichotomy is illusory and misguided. It also underlines the continuous nature of the legalization spectrum- a regulation can be placed at any point along the arrow according to how it scores across the three dimensions. For the purposes of this article, the spectrum also illustrates the transition made by the norms generated by the Compact. As we shall demonstrate, the Compact shifted from generating almost prototypical soft law at its inception to generating rules occupying a progressively more moderate position on the overall legalization spectrum.

II. THE GLOBAL COMPACT AND ITS CRITICS

The practical impossibility of employing hard law at an international level has meant that softer codes of conduct have stepped in to fill the void. We chose the Compact as a case study because it constitutes the single most ambitious international code for the governance of CSR. Other codes, such as the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (1976, revised in 2000), the Caux Round Table Principles (1994) or the WHO/UNICEF code for transnational corporations have failed to achieve the same degree of internationalization.²⁶

The Compact is a strategic policy initiative whereby corporate participants are required to “embrace, support and enact” ten principles in the areas of human rights, labor, the environment and anti-corruption.²⁷ The initiative reflects an eagerness on the part of the U.N. to engage businesses in international development, and serves as a good example of the recent “pendulum swing away from stricter forms of regulation” at the international level.²⁸ The Compact’s mandate was recently reaffirmed by a new U.N. General Assembly Resolution,²⁹ and it employs soft (but, as we shall demonstrate, increasingly more moderate) forms of legalization to “leverage the platform” of large corporations³⁰ and encourage socially responsible corporate behavior.

²⁶ Org. Econ. Coop. Dev., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2009); Caux Roundtable, CRT Principles for Responsible Business (2009); Kathryn Sikkink, *Codes of Conduct for Transnational Corporations: the Case of the WHO/UNICEF Code*, 40 INT’L ORG. 815, 815-840 (1986).

²⁷ United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (Last visited Dec. 5, 2010).

²⁸ Peter Utting, *Business Responsibility for Sustainable Development*, 2 UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT OCCASIONAL PAPER 1, 29 (2000).

²⁹ G.A. Res. 1, U.N. GAOR, 62nd Sess., Agenda Item 61, U.N. Doc. A/C. 2/62, at (Dec. 3, 2007).

³⁰ John Gerard Ruggie, *Reconstituting the Global Public Domain – Issues, Actors, and Practices*, 10 EUR. J. INT’L RELAT., 499, 515 (2004).

The initiative operates on a purely voluntary basis. Companies participate simply by completing an online form and sending a letter of commitment to the U.N. Secretary-General expressing their desire to participate.³¹ The Compact relies on “public accountability, transparency and the enlightened self-interest of companies, labor and civil society to initiate and share substantive action in pursuing the principles upon which [it] is based.”³² The ten fundamental principles serve as “macro contracts” defining the responsibilities of the participant companies, while at a micro-level, local networks develop between participating firms and other stakeholders such as

NGOs, academia and labor associations.³³ The principles are based on existing norms espoused in the Universal Declaration of Human Rights, the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption respectively.³⁴

The Compact has no shortage of critics. Its inability to legally enforce companies’ implementation of its ten principles is viewed by many as a fatal weakness.³⁵ It has been strongly criticized for not demanding a higher degree of accountability from its corporate participants³⁶ and for lacking the ability to sanction those failing to live up to their commitments.³⁷ Put another way, its critics complain that “[i]ndividual and collaborative initiatives continue to be dominated by self-assertion rather than accountability.”³⁸ They argue that companies can only be made accountable through legally enforceable obligations, and that softer forms of legalization, such as voluntary CSR initiatives, are “no substitute for the legislative actions of a recognized political authority”³⁹ given the lack of any basis for

³¹ *Business Participation*, United Nations Global Compact, available at http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited Nov. 13, 2010).

³² ROGER BLANPAIN & MICHELE COLUCCI, *THE GLOBALIZATION OF LABOUR STANDARDS: THE SOFT LAW TRACK* 41 (2004).

³³ Dirk Ulrich Gilbert & Andreas Rasche, *Opportunities and Problems of Standardized Ethics Initiatives – a Stakeholder Theory Perspective*, 82 J. BUS. ETHICS 755, 758-759 (2008).

³⁴ United Nations Global Compact, *supra* note 27.

³⁵ Cohen, *supra* note 12, at 196.

³⁶ Haider Rizvi, *UN Pact with Business Lacks Accountability*, INTER PRESS SERVICE, June 24, 2004, <http://www.globalpolicy.org/reform/business/2004/0624lack.htm>; Kilgour, *supra* note 12, at 768.

³⁷ Fritsch, *supra* note 4, at 22.

³⁸ Aruna Das Gupta, *Social Responsibility in India: Towards Global Compact Approach*, 34 INT’L J. SOC. ECON. 637, 655 (2007).

³⁹ Steven Hughes et al., *The Global Compact: Promoting Corporate Responsibility?*, 10 ENVIRON. POL. 155, 157 (2001).

legal claims or redress under such initiatives.⁴⁰ As evidence, such critics point to the mere issuance of a “statement of concern”⁴¹ following the major oil spill in the Gulf of Mexico in early 2010 by the oil giant BP, a Compact member since 2000.⁴² The Compact’s seventh principle states that “businesses should support a precautionary approach to environmental challenges.”⁴³ In the face of such a flagrant breach of this principle, it is certainly arguable that the Compact should have done a great deal more to censure the company.

Critics tend to further dismiss the Compact as a public relations gimmick,⁴⁴ an example of companies lobbying for “business friendly (sic) pseudo-solutions” to the social costs they create, instead of enforceable rules.⁴⁵ They call for binding rules to replace the voluntary approach,⁴⁶ and pressure the U.N. to “have its own system of complaints and adjudications, which could conduct investigations to a standard that would have legal standing.”⁴⁷

III. ASSESSING THE INSTITUTIONALIZATION OF SOFT LAW BY THE GLOBAL COMPACT

It is clear from such criticism that soft law governance initiatives like the Compact have their limitations. However, in failing to acknowledge the advantages of voluntary, non-binding regulations that they generate, many critics leap to the easy and intellectually lazy assumption that hard law

⁴⁰ James A. Paul & Jason Garred, *Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process*, GLOBAL POL’Y FORUM (December 2005), available at: <http://www.globalpolicy.org/soecon/ffd/2000papr.htm> (last visited Jan. 11, 2011).

⁴¹ Global Compact Critics, ‘Global Compact on BP: “Big Accidents Happen All the Time” (2010) available at: <http://globalcompactcritics.blogspot.com/2010/06/global-compact-on-bp-big-accidents.html> (last visited Jan. 11, 2011).

⁴² David Scheffer, *BP Shows the Need for a Rethink of Regulation*, FINANCIAL TIMES (May 27, 2010), available at <http://www.ft.com/cms/s/0/919f37fe-69c1-11df-8432-00144feab49a.html#axzz159EXLhRF> (last visited Jan. 11, 2011).

⁴³ United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (Last visited Nov. 13, 2010).

⁴⁴ See Winston, *supra* note 1; Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 GOVERNANCE: AN INT’L J. OF POL’Y, ADMINISTRATION, & INSTITUTIONS. 231, 234 (2008).

⁴⁵ Olivier Hoedeman, *Rio +10 and the Greenwash of Corporate Globalization*, 45 DEV. 39, 40 (2002).

⁴⁶ See, e.g., Amnesty International, *Letter to Louise Fréchette raising concerns on U.N. Global Compact*, GLOBAL POLICY FORUM (Apr. 7, 2003), <http://www.globalpolicy.org/ngos/ngo-un/access/2003/0606compact.htm>.

⁴⁷ Jem Bendell, *Flags of Inconvenience? The Global Compact and the Future of the United Nations*, ICCSR Research Paper Series (Nottingham U. Bus. Sch.), 2004, at 12.

trumps soft law in every conceivable context. Voluntary initiatives like the Compact compensate for their lack of binding authority in a variety of different ways. We now examine these mechanisms using the legalization spectrum as our analytical framework.

A. Obligation: The Compact's 'Carrots and Sticks' Approach

From the very beginning, the Compact faced the difficult challenge of generating meaningful and effective CSR regulations without being able to legally enforce them.⁴⁸ Consequently, it became imperative that the initiative made it in the interest of its profit-driven corporate participants to live up to their commitments. As a soft law initiative, it has a variety of carrots and sticks at its disposal to help it achieve this. The “carrot” approaches involve selling the advantages of its voluntary, flexible status to its participants. The “stick” approaches involve sanctioning non-complying, free-riding companies by undermining their reputation. As we will now demonstrate, the “carrots” were employed from the very outset to secure broad participation in the Compact. It was only once this had been achieved that the “sticks” were progressively ratcheted up to preserve the integrity of the initiative.

1. The Carrots

One major carrot offered by the Compact to participating companies is autonomy regarding the way in which they implement the ten principles. The Compact also provides interactive forums in which its participants can facilitate dialogue and promote the sharing of CSR strategies.⁴⁹ However, the biggest carrot of all is membership of the Compact itself - corporations can enhance the value of their brand by associating themselves with the initiative and, by extension, with the United Nations.

By allowing regulated companies to retain autonomy over how they choose to incorporate the ten principles into their everyday practices, the Compact does not alienate potential participants. Most scholars believe that corporations quite simply would not sign up to the Compact if a legal obligation was imposed, and there is evidence to support this theory.⁵⁰ The

⁴⁸ See Georg Kell, *The Global Compact: Selected Experiences and Reflections*, 59 J. BUS. ETHICS 69, 72 (2005).

⁴⁹ See Jean-Philippe Therien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOBAL GOVERNANCE: A REV. OF MULTILATERALISM AND INT'L ORGS. 55, 55-75 (2006).

⁵⁰ Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?*, 13 FORDHAM ENVTL. L.J. 343 (2002). See also Kuper, *supra* note 7, at 11.

binding nature of the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights,” introduced in 2003 by the U.N. Human Rights Commission, meant that this initiative met with firm resistance from most businesses and its development was inhibited as a result.⁵¹ The danger of imposing forms of legalization that score too high on the “obligation” dimension was also highlighted by the unwillingness of developed states to participate in the legally binding “Principle of Non-Reciprocal Preferential Treatment of Developing States” in the 1974 Charter of Economic Rights and Duties of States.⁵² Companies, like states, prefer their activities not to be subject to the decisions of an external force. The Compact appears to have internalized this message; it prioritized high participation over enforcement integrity until enough companies were signed up. Only then did it toughen its stance by imposing progressively more advanced and onerous “stick” tactics, to which we now turn.⁵³

2. The Sticks

The Compact did employ some measure of coercion from the outset. However, this was initially limited to the monitoring of company behavior by NGOs and the media, coupled with the subsequent imposition of reputational sanctions for socially irresponsible practices. Political scholars Margaret Keck and Kathryn Sikkink suggest that activist organizations employ a variety of tactics designed to hold the actors they scrutinize to account. These tactics apply equally to voluntary standards initiatives like the Compact, and include strategies such as “leverage politics.”⁵⁴ This practice involves the “mobilization of shame,” where “the behavior of target actors is held up to the bright light of international scrutiny.”⁵⁵ The effectiveness of such a strategy lies in employing what leading foreign policy expert Joseph Nye sees as a classic feature of “soft power”- that is, using the “hard power” of another actor (in this case, a company’s high “brand equity”) against it as a means to obtain a desired outcome.⁵⁶ As legal theorist Andre Guzman notes, when a state signs up to a voluntary agreement, it offers its “reputation for living up to its commitments as a form of collateral,” where “failure to live up to one’s commitments harms

⁵¹ Fritsch, *supra* note 4, at 25-26.

⁵² Gruchalla-Wesierski, *supra* note 18, at 41.

⁵³ Hassel, *supra* note 39, at 245.

⁵⁴ Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 Int’l Soc. Sci. J.89, 97 (Mar. 1999).

⁵⁵ *Id.*

⁵⁶ Joseph Nye, Lecture at Oxford University: Hard and Soft Power in International Governance (May 25, 2009).

ones reputation and makes future commitments less credible.”⁵⁷ We submit that this principle applies to an even greater extent to large companies, given the enormous value and investment placed in their corporate image.

Naming and shaming is a highly effective strategy, and the voluntary instrument known as the Extractive Industries Transparency Initiative (EITI) is an excellent example of its success in practice. Set up by the UK-based NGO “Global Witness,” the EITI sets an international standard for companies in the extractive sector to publish the revenues they pay to governments for oil, gas and mining contracts. Despite its purely voluntary status, the EITI has been an enormous success story. 50 of the world’s extractive-industry companies support and actively participate in the EITI,⁵⁸ while 28 countries have applied to become EITI compliant.⁵⁹ Why are resource-rich developing countries bending over backwards to comply with a voluntary standard created by small Western NGO? Oxford University economist Professor Paul Collier suggests that it is because the EITI “sorts the sheep out from the goats . . . [t]he decent governments sign up, and that then reveals the ones that refused to sign up as just what they are.”⁶⁰ Professor Collier argues in his recent book *The Bottom Billion* that “[n]orms are effective because they are enforced by peer pressure . . . [a]n international charter gives people something very concrete to demand: either the government adopts it or it must explain why it hasn’t.”⁶¹ The same can be said of the Compact, except we replace the word “government” with “corporation.” The beauty of the concept is that it costs next to nothing to implement; it simply relies on the scrutiny of advocacy networks that are already in place, and the desire of the actors regulated to be seen as good global citizens.

As the Compact has developed, its mechanisms for inflicting reputational sanctions on its non-complying participants have become progressively more onerous. The Compact’s initial refusal to publicly shame those failing to file annual progress reports was seen as a major weakness.⁶² However, now that it has attracted a plethora of participants, the initiative has toughened its stance; as part of the 2005 reforms, the Compact introduced “Integrity Measures.” These state that any company failing to

⁵⁷ Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1848-50 (2002).

⁵⁸ *EITI Supporting Companies*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/implementingcountries> (last visited Nov. 11, 2010).

⁵⁹ *Id.*

⁶⁰ PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 139-144 (Oxford University Press 2007).

⁶¹ *Id.*

⁶² Cohen, *supra* note 12, at 196; Daniel Litvin, *Memo to the President: Raising Human Rights Standards in the Private Sector*, Foreign Policy, Nov. 1, 2003, at 70.

report its progress annually will be labeled publicly as “non-communicating” on the Compact’s website.⁶³ A company will be de-listed from the initiative if this failure is repeated the following year.⁶⁴ The Financial Times reports that in 2010, 55 companies were delisted for their failure to provide a communication on progress.⁶⁵

To strengthen these reforms further, a more detailed and transparent system for reviewing complaints has been put into place.⁶⁶ Initially, the Compact adopted a “softly-softly” approach: it forwarded substantiated complaints to the company concerned and merely requested information on the company’s plans to rectify the situation, occasionally providing guidance to assist the company in this process.⁶⁷ However, failure on the part of the company to enter into dialogue now results in the company being labeled “inactive” or even being removed from the list of Compact participants.⁶⁸ The 2005 reforms have been praised for allowing “the possibility of filing complaints of systematic or egregious abuse of the Compact’s overall aims and principles to the Global Compact Office against any participating company.”⁶⁹ This toughened complaints procedure works primarily because it is largely self-regulating; it is in the interests of both the Compact and rival companies to see an offending participant held to account for its violations. Other firms lose out when their competitors succeed in evading their responsibilities.⁷⁰

Finally, since 2005 the “Policy on the Use of the Compact Name and Logos” has provided “specific and detailed examples of circumstances under which . . . the display of the logos will be generally permitted.”⁷¹ Prior to this, the Compact was strongly criticized for allowing participating companies to “blue-wash” their socially irresponsible activities through their

⁶³ Global Compact, <http://www.unglobalcompact.org/AbouttheGC/IntegrityMeasures/index.html> (last visited Nov. 16, 2010).

⁶⁴ *Id.*

⁶⁵ Steve Johnson, *Companies Fail UN’s Global Compact*, FINANCIAL TIMES (Feb. 14, 2010), available at <http://www.ft.com/cms/s/0/8b19f9ee-1806-11df-91d2-00144feab49a.html#axzz1AnNcx7ZR> (last visited Jan. 11, 2011).

⁶⁶ *335 Companies Inactive as Part of Quality Drive*, GLOBAL COMPACT, http://www.unglobalcompact.org/newsandevents/news_archives/2006_10_02.html, (last visited Nov. 11, 2010).

⁶⁷ *The Global Compact’s Next Phase*, GLOBAL COMPACT, http://www.unglobalcompact.org/docs/about_the_gc/gc_gov_framework.pdf, (last visited Nov. 11, 2010).

⁶⁸ *See How to Participate*, GLOBAL COMPACT, http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited Nov. 11, 2010).

⁶⁹ Karsten Nowrot, *The New Governance Structure of the Global Compact: Transforming a ‘Learning Network’ into a Federalized and Parliamentarized Transnational Regulatory Regime*, 47 *Essays in Transnat’l Econ. L.* 27-28 (2006).

⁷⁰ Hassel, *supra* note 39, at 235.

⁷¹ Nowrot, *supra* note 62.

association with the initiative- i.e. “wrapping themselves in the flag of the United Nations”⁷² without taking any substantial steps to improve their behavior. For example, the U.N. and its former Secretary-General Kofi Annan were heavily criticized for showing “poor judgment in allowing executives such as Nike’s Phil Knight to be photographed with Mr. Annan in front of the U.N. flag, without any substantial effort by the company to adhere to the Global Compact principles.”⁷³ Since the 2005 reforms, however, the Compact has significantly strengthened the coercive pressure it applies.

Given the more stringent mechanisms for inflicting reputation sanctions outlined above, we argue that the Compact’s norms have shifted from a low position to a moderate position on the sliding scale of “obligation.”

B. Precision: The Compact’s Best Practice & Engagement Opportunities

Although the Compact has specified its intended objectives in its ten governing principles, these are set out in extremely vague, one-sentence terms. Initially, the means by which companies were supposed to achieve these goals were not articulated. The second principle, for example, states that businesses should “make sure that they are not complicit in any human rights abuses.”⁷⁴ However, the Compact in no way makes it explicit how this principle should be translated into practice. Unsurprisingly, the Compact has been heavily criticized for failing to define the obligations of its participants in a more detailed manner.⁷⁵ Such critics view low “precision” scores as a clear weakness undermining the Compact’s overarching aim to get companies to embrace their core values.⁷⁶ They see voluntary codes as frequently amounting to little more than “vague statements of principle that cannot provide reliable guidelines for behavior in concrete situations.”⁷⁷

⁷² Transnational Action and Resource Center, *Tangled Up In Blue: Corporate Partnerships at the United Nations*, available at: <http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf> (last visited Jan. 11, 2011).

⁷³ Kenny Bruno & Joshua Karliner, *The U.N.’s Global Compact, Corporate Accountability and the Johannesburg Earth Summit*, 45 *Society for International Development* 33-38 (2002).

⁷⁴ Global Compact, <http://www.unglobalcompact.org/aboutthegc/index.html>. (last visited Dec. 3, 2010).

⁷⁵ Daniel Litvin, *The FP Memo: A Strategy for Business and Human Rights, Raising Human Rights Standards in the Private Sector*, Foreign Policy, http://www.foreignpolicy.com/articles/2003/11/01/a_strategy_for_business_and_human_rights (last visited Nov. 18, 2010).

⁷⁶ Litvin, *supra* note 57.

⁷⁷ Paul & Garred, *supra* note 35; Litvin, *supra* note 57; Elisa Morgera, *The U.N. and Corporate Environmental Responsibility: Between International Regulation and Partnerships*, 15 *Rev. Eur. Cmty. & Int’l Env’tl. L.* 93, 100 (Apr. 2006).

Such criticisms miss something important: these ten one-sentence principles are intended merely as a starting point. Detailed ideas for further CSR projects may be incrementally developed, since the use of soft law means that the more formal, bureaucratic policy instruments of hard law initiatives are avoided.⁷⁸ A parallel may be drawn to the discretion available to the signatories of the European Union's Stability and Growth Pact, where "scope for reform without resort to formal legal changes is possible and more likely than if formal legal instruments . . . had to be reformed."⁷⁹ As Georg Kell, Executive Director of the Compact, pointed out: "[t]he rapid evolution of the Compact stands in stark contrast to the cumbersome task of establishing regulation, and highlights the advantage of voluntary initiatives' flexibility."⁸⁰ Given that the Compact is only ten years old and arguably still in its embryonic stages, it seems logical for the initiative to limit the degree of rigid *ex ante* legislation it produces, and instead to develop progressively more precise and detailed norms through dialogue between its participants that is free of "command and control."⁸¹ This is where the Compact's function as an interactive forum for discussion and learning plays such an important role. At the Compact's inception, it was imperative not to alienate businesses through legally binding mechanisms, but rather to generate progressively more detailed ideas for socially responsible behavior with them as willing, engaged parties to the process.

Thus, it is important not to neglect the fact that the Compact's much-maligned "vagueness" actually presents significant advantages. The low "precision" score of the Compact's ten principles encourages widespread corporate participation in the initiative. Rather than alienate companies by scaring them away with detailed rules, the Compact gives them the autonomy to implement its principles in different ways, according to what works best in their industry and in the jurisdiction in which they operate. Comparisons can be made with the Open Method of Coordination governance system (OMC) operating within the European Union, which also allows for the flexible adaptation of policy initiatives according to the "diverse institutional arrangements, legal regimes and national circumstances in the member states."⁸² The Compact shares the desire of the

⁷⁸ Michelle Cini, *The Soft Law Approach: Commission Rule-making in the EU's State Aid Regime*, 8 J. EUR. PUB. POL'Y 192, 195 (Apr. 2001).

⁷⁹ Dermot Hodson & Imelda Mahler, *Soft Law and Sanctions: Economic Policy Coordination and Reform of the Stability and Growth Pact*, 11 J. OF EURO. PUB. POLICY 798, 802 (Oct. 2004).

⁸⁰ Kell, *supra* note 43, at 73.

⁸¹ Therien & Pouliot, *supra* note 44, at 62.

⁸² Armin Schafer, *A New Form of Governance? Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD*, 13 J. Eur. Pub. Pol. 70, 83 (2006).

OMC to strike a balance between respecting the diversity of its participants, whilst retaining the advantages of collective action.⁸³

The Compact's soft law instruments provide a variety of interactive platforms for participating companies to discuss and learn about CSR policies collectively.⁸⁴ The consultancy group McKinsey's analysis of participant companies' motivations for signing up to the Compact revealed that, after the purpose of addressing humanitarian concerns, the three most important motivations companies most frequently cited were: (1) the acquisition of practical know-how, (2) the opportunity to network with other organizations, and (3) to become more familiar with CSR practices.⁸⁵ The most attractive feature of the Compact for its participants therefore seems to be the opportunity to engage in cooperative dialogue with other civil society actors (including other companies) and thereby learn about how they can best improve their CSR activities. These so-called "engagement opportunities" provided by the Compact fall into three principal categories.⁸⁶

Firstly, the Compact has a system of "Learning Networks."⁸⁷ These are designed to "facilitate the progress of companies . . . with respect to implementation of the ten principles, while also creating opportunities for multi-stakeholder engagement and collective action."⁸⁸ The aim is to foster an environment in which companies are able to engage in a mutually beneficial information exchange.⁸⁹ An Annual Local Networks Forum is held every year to enable further networking and learning opportunities.⁹⁰ Secondly, the Compact organizes "Policy Dialogues," meetings which allow for "intensified exchange of ideas" between businesses, government leaders, U.N. agencies, NGOs, academics and other actors.⁹¹ Such dialogues "focus on specific issues relating to globalization and corporate citizenship"; past topics have included "The Role of the Private Sector in Zones of Conflict" and "Business and Sustainable Development."⁹² From these Policy

⁸³ Susana Borrás & Kerstin Jacobsson, *The Open Method of Coordination and New Governance Patterns in the EU*, 11 J. Eur. Pub. Pol. 185 (2004).

⁸⁴ United Nations, *What is a Local Network?*, http://www.unglobalcompact.org/docs/networks_around_world_doc/What_is_a_Local_Network.pdf (last visited Nov. 18, 2010).

⁸⁵ McKinsey & Company, *Assessing the Global Compact's Impact*, available at http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2004_06_09/imp_ass.pdf (last visited Jan. 11, 2011).

⁸⁶ Blanpain & Colucci, *supra* note 28, at 112.

⁸⁷ United Nations, *supra* note 83.

⁸⁸ *Id.*

⁸⁹ Blanpain & Colucci, *supra* note 28, at 112.

⁹⁰ United Nations, Annual Local Networks Forum (2009), http://www.unglobalcompact.org/bg/index.php?p=archive&open_news=111 (last visited Nov. 18, 2010).

⁹¹ Fritsch, *supra* note 4, at 19.

⁹² Blanpain & Colucci, *supra* note 28, at 112.

Dialogues, case studies of successful best practices can be sent to the Global Compact Office.⁹³ Finally, the Compact uses its website as repository of information.⁹⁴ In addition to providing their mandatory annual “Communication on Progress,” companies can also submit “case stories” detailing specific actions they have taken to further their CSR commitments.⁹⁵ There is a large public relations incentive for companies to deliver a detailed account of the improvements they have been making in their CSR practices; the Compact’s “Notable Program” rewards outstanding Communications on Progress by publishing them in a special section on its website.⁹⁶

The principle advantage presented by the learning environment fostered through soft law mechanisms is that it provides scope for the “precision” score of the norms generated to be progressively increased as detailed, universally agreed upon norms and standards of practice are generated by the participants.⁹⁷ In this regard, the Compact may again be compared with the OMC governance system, for which “[t]he objective is not to prescribe uniform rules,” but to organize “a learning process in order to promote the exchange of experiences and best practices.”⁹⁸ The creation of any detailed best practices would almost certainly be impossible to achieve through a hard law initiative, given the reluctance of companies to bind themselves to precise legal obligations.

As companies progressively acquire experience in the field of CSR and disseminate this information through the channels that the Compact has put in place, ideas, and standards evolve. As internationally-renowned political scientist Ann Florini notes with respect to the Compact, “[t]he dispute over exactly what . . . standards should be - and who should decide - has just begun.”⁹⁹ Corporate strategies, structures, and production processes are subject to constant and fast-paced change; it therefore makes sense to have a malleable, adaptable body of knowledge which can be added to as new norms are generated, rather than a rigid system of legally binding legislation.¹⁰⁰ The latter system would quickly become obsolete as the

⁹³ Fritsch, *supra* note 4, at 19.

⁹⁴ United Nations, *Progress & Disclosure*, http://unglobalcompact.org/COP/case_search.html (last visited Nov. 18, 2010).

⁹⁵ *Id.*

⁹⁶ *Id.*; United Nations, *supra* note 79; United Nations, *supra* note 82; United Nations, *Notable Communications on Progress*, http://www.unglobalcompact.org/COP/notable_cops.html (last visited Nov. 18, 2010).

⁹⁷ Hassel, *supra* note 39, at 246.

⁹⁸ Sabrina Regent, *The Open Method of Coordination: A New Supranational Form of Governance?*, 9 EUR. L. J. 190, 191 (Apr. 2003).

⁹⁹ Florini, *supra* note 6.

¹⁰⁰ John Gerard Ruggie, *The Global Compact as a Learning Network*, 7 JOURNAL OF

principles it espoused became dated and redundant. The same philosophy lies behind the Vienna Convention for the Protection of the Ozone Layer, the framework accompanying the 1987 Montreal Protocol which was commonly recognized as one of the most successful international agreements in recent history.¹⁰¹ The obligations within the Convention were set out in imprecise terms to begin with, allowing “flexibility and protection for states to work out problems over time through negotiations shaped by normative guidelines, rather than constrained by precise rules.”¹⁰² Similarly, the flexible nature of the General Agreement on Tariffs and Trade has been praised, given the difficulty in imposing precise *a priori* rules considering the “realities of incomplete information about future economic shocks.”¹⁰³ The Compact therefore adopts the more realistic strategy of attempting to generate consensus around initially vague but progressively more precise soft law norms.

As multi-stakeholder dialogue continues to become more sophisticated and as managers become more aware of the needs of their constituencies, the hope is that different, industry-specific behavioral norms will emerge in a “bottom-up” fashion¹⁰⁴ and will become embedded within the culture of that particular industry and that a “plethora of voluntarist initiatives [will] converge over time on a shared understanding.”¹⁰⁵ Importantly, the norms generated through such a process will enjoy a great deal of legitimacy and could eventually harden into more formal legal codes.¹⁰⁶ Take the EITI initiative discussed earlier in this article- the voluntary standards it set for companies very recently been used as the template on which binding legislation in the United States is now based.¹⁰⁷ This year’s much-publicized Dodd-Frank financial reform legislation¹⁰⁸ contains a rule, based on EITI

CORPORATE CITIZENSHIP 371 (2001).

¹⁰¹ Daniel C. Esty, *Beyond Kyoto: Learning From the Montreal Protocol*, in ARCHITECTURES FOR AGREEMENT: ADDRESSING GLOBAL CLIMATE CHANGE IN THE POST-KYOTO WORLD 260 (Joseph E. Aldy & Robert N. Stavins eds., Cambridge University Press 2007).

¹⁰² Abbott & Snidal, *supra* note 16, at 443.

¹⁰³ Judith Goldstein and Lisa L. Martin, *Legalisation, Trade, Liberalisation and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603, 604 (2000).

¹⁰⁴ Therien & Pouliot, *supra* note 44, at 57.

¹⁰⁵ Hassel, *supra* note 39, at 232.

¹⁰⁶ Ruggie, *supra* note 91, at 372.

¹⁰⁷ Michael Peel, *New law will force disclosure of secret payment*, FINANCIAL TIMES (Jul. 16, 2010), available at <http://search.ft.com/search?queryText='will+force+US-listed+companies+to+publish+details+of+taxes,+royalties+and+other+fees+they+pay+in+the+countr ies+where+they+operate'> (last visited Jan. 11, 2011).

¹⁰⁸ For more information, see page 15 of the brief summary of the Dodd-Frank Act by United States Senate Committee on Banking, Housing and Urban Affairs, available at: http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehen

voluntary principles, which “will force US-listed companies to publish details of taxes, royalties and other fees they pay in the countries where they operate.”¹⁰⁹ This is a perfect example of how harder forms of regulation can evolve from voluntary standards initiatives like the EITI and the Compact.

The Compact’s norms on the “precision” scale have moved, therefore, from an initial position where it was extremely difficult to identify what conduct did or did not constitute compliance with Compact principles, given their vagueness and the initial lack of guidelines, to a position where detailed standards have developed in a number of different fields.¹¹⁰ We therefore argue that the evolution of these non-binding norms shifts them from a low to a moderate “precision” score.

C. Delegation

As we noted earlier, the “delegation” dimension may be subdivided into two components. It refers firstly to the degree to which third parties have been delegated the responsibilities of interpreting, implementing, and applying the rules. It refers secondly to the degree to which such parties have been delegated the responsibility for resolving disputes.

The Compact delegates very little dispute resolution authority to third parties. The only mechanism that even approaches such a delegation is the option for the Compact to initiate legal proceedings against a company in the event of a misuse of its name or logo.¹¹¹ Moreover, this provision is articulated in extremely vague terms.¹¹² As a result, it is difficult to give the Compact’s norms anything other than a very low score for the first component of the “delegation” dimension.

On the second component, however, the Compact’s norms score higher. This “rule-making and implementation” component consists of a sliding scale running from softest forms of legalization that constitute “negotiations forums” to the hardest forms which consist of “binding regulations” with “centralized enforcement.”¹¹³ We argue that the external “engagement opportunities” provided by the Compact are no longer mere “negotiations forums,” but have evolved into providing “coordination standards” (in the middle of the sliding scale) to companies in the form of best practices.¹¹⁴ Additionally, we have shown that in carrying out their

sive_summary_Final.pdf (last visited Jan. 11, 2011).

¹⁰⁹ Michael Peel, *supra* note 106.

¹¹⁰ Blanpain & Colucci, *supra* note 28, at 112.

¹¹¹ GLOBAL COMPACT, *Global Compact Logo Policy*, http://www.unglobalcompact.org/AboutTheGC/Global_Compact_Logo/index.html (last visited Nov. 16, 2010).

¹¹² *Id.*

¹¹³ Abbott & Snidal, *supra* note 16, at 416.

¹¹⁴ *Id.*

“naming and shaming” function, advocacy networks such as NGOs and the media have been delegated a role of “monitoring and publicity” (also positioned in the middle of the scale) to ensure corporate compliance with the Compact’s ten principles.

In this context, it is important to highlight the value of the “spotlight effect,” in keeping Compact participants honest.¹¹⁵ Keck and Sikkink note that, once companies have publicly committed themselves to the ten principles, advocacy networks can use their position and command of information “to expose the distance between discourse and practice.”¹¹⁶ Such groups will not accept participants’ “Communications on Progress” at face value; they will scrutinize them and apply severe pressure in the event that a high profile company fails to live up to its commitments.¹¹⁷ Despite its voluntary status, the Compact is able to rely on watchdog organizations such as Corpwatch and Dissident Voice to employ the naming and shaming strategies we have already referred to.¹¹⁸ For example, the online publication *Multinational Monitor* publishes a notorious annual list of the ten worst companies in that year.¹¹⁹ Appearing on that list is a public relations nightmare for any company and something to be avoided at all costs. Overall, therefore, we argue that the Compact has moved from a low to a slightly more moderate “delegation” score.

CONCLUSION

As we have endeavored to illustrate, clear benefits exist in starting an international regulatory mechanism at the softer end of the legalization spectrum. Once a broad participation base has been secured and the norms generated have become widely accepted and legitimized, the initiative can then shift up the legalization spectrum without overly alienating its participants. Critics who scoff at the Compact’s “soft” initial approach and argue that harder law mechanisms should have been imposed from the outset seem to ignore the harsh truth that companies simply would not agree to be bound like this. Nor would there have been any opportunity for the Compact’s norms to have been developed and refined to the degree of precision that they have been. It is likely, therefore, that the Compact would have failed at the first hurdle.

¹¹⁵ William H. Meyer & Boyka Stefanova, *Human Rights, the U.N. Global Compact, and Global Governance*, 34 CORNELL INT’L L.J. 501, 504 (2001).

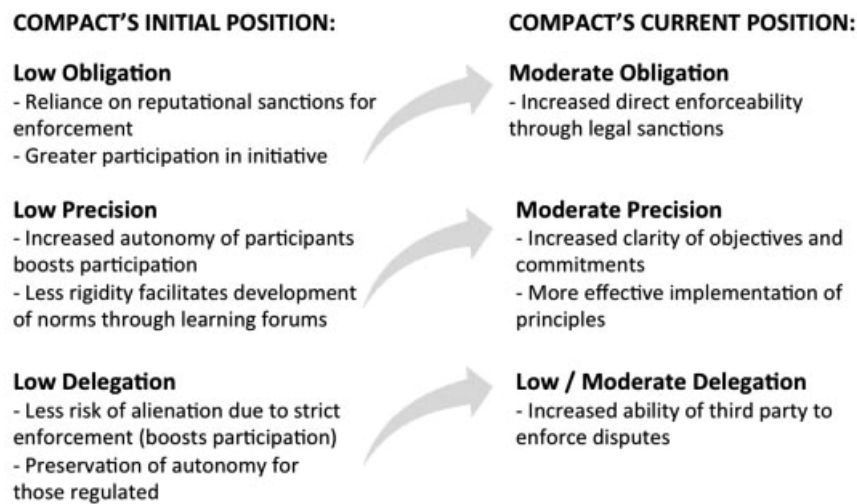
¹¹⁶ Keck & Sikkink, *supra* note 49, at 97-98.

¹¹⁷ *Id.*

¹¹⁸ Winston, *supra* note 1, at 77.

¹¹⁹ See, e.g., Robert Weissman, *The System Implodes: The 10 Worst Corporations of 2008*, available at <http://multinationalmonitor.org/mm2008/112008/weissman.html> (last visited Nov. 16, 2010).

The Compact at its inception can be likened to a mountain biker at the start of his or her journey. The gears on the bike represent the legalization spectrum; first gear is prototypical soft law and sixth gear is prototypical hard law. Mountain bikers cannot start their journey in sixth gear; there is insufficient momentum to propel them forward, so they make little or no progress. A far more effective technique is to move up steadily through the gears as progressively more momentum is generated. In gradually hardening its regulations as participation in the initiative increased and as precise norms developed, this is precisely what the Compact's strategy has accomplished. It has shifted from an extremely soft initial position on all three scales- obligation, precision and delegation- to a more moderate stance that provides the most effective means of attaining its objectives. Its strategy is an instructive template to other soft law initiatives, and can be summarized in the diagram below:



Ghafele and Mercer, 2010

We are certainly not holding up soft law as the ideal means to ensure effective collective action on CSR- its limitations have been well articulated by critics and have also been raised in this article. Detailed research is necessary to explore the extent to which soft law initiatives such as the Compact have actually succeeded in changing the day-to-day operating practices of the companies regulated, beyond the rhetoric of annual company reports. In a perfect world, businesses would be legally bound to engage in ethically sound practices from the outset. However, this article does attempt to temper the criticism of soft law by making the case for its immense value

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to initiatives such as the Compact. In this context, soft law should not be seen as merely “a poor relation of hard law.” On the contrary, in many instances it is deliberately and consciously selected as the most effective means available to achieve a desired objective.¹²⁰ Despite the obvious limitations of a softer approach, any project designed to foster collective international action must ensure that it attracts a sufficient participation base and takes the time to develop a sufficiently precise normative framework. Only then should it begin to tighten the regulatory screw on its participants.

¹²⁰ Hodson & Mahler, *supra* note 72, at 799-801.